

July 26, 2023

The Honorable Merrick Garland
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Dear Attorney General Garland:

I am writing to inquire about the Department of Justice's (DOJ) November 17, 2022 guidance on discharging student loans in bankruptcy.¹ The Department of Education (ED) has recently confirmed that after more than three years of a pause on student loan payments, interest, and collections, interest on federal student loans will begin accruing on September 1, 2023 and payments will be due beginning in October 2023.² I am concerned about a wave of harm to borrowers as payments restart, especially considering the recent findings from the Consumer Financial Protection Bureau (CFPB) that the delinquency rate for student loan borrowers is higher now than before the pandemic.³ The CFPB found that more than one in thirteen borrowers are falling behind on their other payment obligations and one in five borrowers have risk factors that indicate potential difficulties when payments resume,⁴ further exacerbating concerns about a spike in delinquencies and defaults once payments resume in the fall. These concerns are heightened by the disappointing decision by the Supreme Court, which substituted politics for the rule of law and denied President Biden's initial plan to provide up to \$20,000 in student debt cancellation for working Americans.⁵

The DOJ's November 2022 guidance brought long-awaited changes that could help establish a fairer and more transparent bankruptcy system that offers student loan borrowers a meaningful path to financial recovery.⁶ Further, I am supportive of the Biden Administration's recent announcement of a 12-month on-ramp transition period to support borrowers "smoothly

¹ Department of Justice, "Guidance for Department Attorneys Regarding Student Loan Discharge Litigation," November 17, 2022, <https://www.justice.gov/civil/page/file/1552681/download>.

² Politico, "Biden admin will resume interest on federal student loans Sept. 1; monthly payments due in October," Michael Stratford, June 12, 2023, <https://www.politico.com/newsletters/weekly-education/2023/06/12/biden-admin-will-resume-interest-on-federal-student-loans-sept-1-monthly-payments-due-in-october-00101431>.

³ Consumer Financial Protection Bureau, "Office of Research blog: Update on student loan borrowers as payment suspension set to expire," Thomas Conkling and Christa Gibbs, June 7, 2023, <https://www.consumerfinance.gov/about-us/blog/office-of-research-blog-update-on-student-loan-borrowers-as-payment-suspension-set-to-expire/>.

⁴ *Id.*

⁵ Biden v. Nebraska 600 U.S. ____ (2023), https://www.supremecourt.gov/opinions/22pdf/22-506_nmip.pdf.

⁶ Department of Justice, "Guidance for Department Attorneys Regarding Student Loan Discharge Litigation," November 17, 2022, <https://www.justice.gov/civil/page/file/1552681/download>.

and successfully return to repayment.”⁷ If these actions are implemented concurrently, they will “help borrowers avoid the harshest consequences of missed, partial, or late payments” while the Department initiates a regulatory process to provide debt relief.⁸ Given the prospect of a potential wave of defaults and delinquencies following the resumption of student loan payments,⁹ I am requesting an update on the impact of the DOJ’s guidance to date on borrowers pursuing bankruptcy.

Student loan borrowers who struggle with their debt have historically faced challenges utilizing the bankruptcy system to discharge their loans for financial recovery. To have student loans discharged, borrowers must meet a notoriously high¹⁰ standard known as the “undue hardship” standard.¹¹ Demonstrating “undue hardship” involves a tedious and costly process that requires borrowers to prove that their inability to repay the loan will persist into the future, that they will be unable to maintain a “minimal” standard of living if forced to repay the loan, and that they have made good faith efforts to repay the loans.¹² This standard has been narrowly interpreted by courts, and has proven to be so difficult to meet that most borrowers do not even attempt to discharge their student loans through the bankruptcy process.¹³ Between 2015 and 2020, roughly 250,000 borrowers filed for bankruptcy annually.¹⁴ Of those, less than one percent saw their student loan debt discharged.¹⁵ Last year, I urged DOJ and ED to address its handling of undue hardship claims by student borrowers.¹⁶

⁷ Department of Education, “Secretary Cardona Statement on Supreme Court Ruling on Biden Administration’s One Time Student Debt Relief Plan,” press release, June 30, 2023, <https://www.ed.gov/news/press-releases/secretary-cardona-statement-supreme-court-ruling-biden-administrations-one-time-student-debt-relief-plan>.

⁸ *Id.*

⁹ Student Debt Crisis Center, “Nationwide Survey Shows Student Loan Borrowers Have Not Recovered from the COVID-19 Pandemic, Additional Relief is Critical,” Cody Hounanian, November 15, 2022, <https://studentdebtcrisis.org/student-debt-covid-survey-nov2022/>.

¹⁰ American Bar Association, “Undue Hardship’ is too Strict a Standard to Discharge Student Loans in Bankruptcy, ABA Argues,” August 10, 2021, https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/august-2021-wl/bankruptcy-journal-0821wl/.

¹¹ Federal Student Aid, “Discharge in Bankruptcy,” <https://studentaid.gov/manage-loans/forgiveness-cancellation/bankruptcy>.

¹² 11 U.S.C. 523(a)(8); CRS, “How Hard Should it be to Discharge a Student Loan in Bankruptcy?,” Kevin M. Lewis, August 27, 2018, <http://www.crs.gov/reports/LSB10192>.

¹³ The New York Times, “For Millions Deep in Student Loan Debt, Bankruptcy Is No Easy Fix,” Ron Lieber and Tara Siegel Bernard, September 10, 2021, <https://www.nytimes.com/2020/11/07/your-money/student-loans-bankruptcy.html>.

¹⁴ Duke Law Journal, “The Student Loan Bankruptcy Gap,” Jason Iuliano, December 2020, p. 539, <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4046&context=dlj>.

¹⁵ *Id.*

¹⁶ Office of Senator Dick Durbin, “Durbin, Schumer, Murray, Senators Call On Department Of Education, DOJ To Follow Through On Pledge To Improve Handling Of Student Debt Bankruptcy Claims,” press release, March 31, 2022,; <https://www.durbin.senate.gov/newsroom/press-releases/durbin-schumer-murray-senators-call-on-department-of-education-doj-to-follow-through-on-pledge-to-improve-handling-of-student-debt-bankruptcy-claims>; Letter from Senator Elizabeth Warren to Attorney General Garland, September 1, 2022, <https://www.warren.senate.gov/imo/media/doc/2022.09.01%20Letter%20to%20DOJ%20re%20Student%20Debt%20Bankruptcy.pdf>.

The November 2022 guidance issued by the DOJ was an important step towards reforming the broken bankruptcy system.¹⁷ In the words of Associate Attorney General Vanita Gupta, the guidance outlines a “better, fairer, more transparent process for student loan borrowers in bankruptcy.”¹⁸ Under the guidance, borrowers will be required to complete an “attestation form” which provides information about their income and expenses that would enable Justice Department attorneys to more easily identify cases that can be recommended for student loan discharge.¹⁹ The guidance aims to address the “cost and intrusiveness” of pursuing an adversary proceeding by simplifying the fact-gathering process, reducing the burden on borrowers, and establishing “clear, transparent, and consistent expectations” for student loan discharge.²⁰

In its guidance, the DOJ recognized that borrowers “have been deterred from seeking discharge of student loans in bankruptcy due to the historically low probability of success.”²¹ Therefore, this updated guidance is designed to allow the DOJ and ED to facilitate the objective of more discharges and provide hope for borrowers seeking bankruptcy as a viable pathway to financial freedom.²² In fact, one of the explicit goals of the 2022 guidance is to “increase the number of cases where the government stipulates to the facts demonstrating a debt would impose an undue hardship and recommends to the court that a debtor’s student loans be discharged.”²³ I am glad to learn that the new process as applied in practice appears to be moving towards these goals. Associate Attorney General Vanita Gupta highlighted in recent remarks to the National Association of Consumer Bankruptcy Attorneys that the DOJ has supported full or partial discharge of student loan debt in “the overwhelming majority” of cases considered as of April 2023 that utilized the new process.²⁴

I appreciate the Administration’s recognition that establishing a fair and accessible discharge process will help borrowers crushed by student loan debt, and I believe the new bankruptcy guidance has the potential to provide a meaningful avenue for relief. I further support DOJ’s plan to evaluate the guidance one year into the guidance’s operation.²⁵ However, with the looming threat of restarting student loan payments, and given that more than eight months have now passed since DOJ’s announcement, I am writing to seek an update on the current implementation and effects of the DOJ guidance. I ask that you provide the following information no later than August 09, 2023:

¹⁷ Department of Justice, “Guidance for Department Attorneys Regarding Student Loan Discharge Litigation,” November 17, 2022, <https://www.justice.gov/civil/page/file/1552681/download>.

¹⁸ Department of Justice, “Justice Department and Department of Education Announce a Fairer and More Accessible Bankruptcy Discharge Process for Student Loan Borrowers,” press release, November 17, 2022, <https://www.justice.gov/opa/pr/justice-department-and-department-education-announce-fairer-and-more-accessible-bankruptcy>.

¹⁹ Department of Justice, “Guidance for Department Attorneys Regarding Student Loan Discharge Litigation,” November 17, 2022, <https://www.justice.gov/civil/page/file/1552681/download>.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Department of Justice, “Guidance for Department Attorneys Regarding Student Loan Discharge Litigation,” November 17, 2022, <https://www.justice.gov/civil/page/file/1552681/download>.

²⁴ Department of Justice, “Associate Attorney General Vanita Gupta Delivers Remarks at the National Association of Consumer Bankruptcy Attorney’s Annual Convention,” April 28, 2023, <https://www.justice.gov/opa/speech/associate-attorney-general-vanita-gupta-delivers-remarks-national-association-consumer>.

²⁵ *Id.*

1. Provide a detailed update on the status and implementation of DOJ's updated bankruptcy guidance issued on November 17, 2022.²⁶
2. Describe how the DOJ has informed Department attorneys handling relevant claims in litigation about the updated bankruptcy guidance, what training these attorneys have received on this guidance, and how DOJ plans to conduct oversight of attorneys' compliance with the guidance.
3. How many borrowers, since November 17, 2022 have filed to discharge their federal student loan balances through bankruptcy proceedings?
 - a. For what percentage of these borrowers did DOJ recommend that the borrowers' student loans be discharged? What percentage of these recommendations were for partial discharges? Please include what proportion of debt was recommended for discharge in each case.
4. Will DOJ review the cases of borrowers who sought discharge of their loans prior to issuance of the 2022 DOJ guidance in order to determine if they meet the current discharge recommendation standards?
 - a. Provide data on the number of borrowers who have filed to discharge their federal student loan balances, and the percentage of borrowers for which student loan discharge was recommended, during each of the last five years.
5. Describe the public outreach DOJ has conducted to ensure that borrowers and their legal representatives are aware of the 2022 bankruptcy guidance.
6. Describe the types and sources of feedback being solicited by DOJ (and other agencies, as applicable, including ED) that DOJ will use to evaluate the guidance after one year of operation.

Sincerely,


Elizabeth Warren
United States Senator

²⁶ Department of Justice, "Guidance for Department Attorneys Regarding Student Loan Discharge Litigation," November 17, 2022, <https://www.justice.gov/civil/page/file/1552681/download>.